THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI, CJ, TSEKOOKO, JSC, KAROKORA, JSC)

CIVIL APPEAL NO.47 OF 1995

PROF. SYED HUQ:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

versus

THE ISLAMIC UNIVERSITY IN UGANDA:::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgment and Decree of Mr. Justice

DC, Porter dated 4th November, 1994

in High Court Civil Suit No.924 Of 1993)

JUDGEMENT OF WAMBUZI C.J.

The appellant, Syed Sufderul Huq, a Professor of Science and Physics brought an action in the High Court against the respondent seeking, inter alia, a declaration that his purported removal from office was unlawful and that he was still an employee of the respondent. He also sought a permanent injunction staying and preventing the respondent from removing him from office before the expiry of the appellant's term of office. The respondent, the Islamic University in Uganda, had employed the appellant first as Professor of Science and Physics and then as Rector.

The suit was dismissed and this is an appeal against the decision of the High Court.

At the hearing of this appeal, two preliminary objections were raised by Mr. Othieno, counsel for the respondent. First that when the Decree, was extracted on *2nd* August, 1985 all the lawyers in Kayondo and Co., the firm of advocates which extracted the Decree did not have a valid practising certificate; that accordingly, the Decree extracted by a member of that firm was not effective in law. The second objection was that the record of appeal was not complete as it did not include the submissions of counsel in the lower court contrary to rule 85 (1) (d) (k) of the Rules of this Court. This objection was abandoned and an adjournment was granted to enable

counsel to file a supplementary record of appeal.

On the remaining objection, learned counsel submitted that the appeal be struck out. We decided to hear the appeal de bene esse and I would like to deal with this point first.

In arguing the objection, Mr. Othieno gave the dates on which the partners in Kayondo and Co. obtained their practising certificates as 17/8/95 for Mr. Kayondo and 18/8/95 for Mr. Womutuba; all dates were subsequent to 2/8/95, the date on which the Decree was extracted. Learned counsel submitted that in law there was no Decree extracted and that the appeal is accordingly incompetent.

Mr. Kawenja, for the appellant, submitted that the objection did not lie as it was raised without leave of the Court as required under rule 101 (b) of the Rules of this Court. Secondly, learned counsel pointed out that the issue of lack of a practising certificate was also raised in the lower court. On that occasion by Mr. Kayondo himself who pointed out that counsel in that case had not had a practising certificate for some years. The court refused to hear that counsel.

Rule 101 (b) of the Rules of this Court provides:

> "At the hearing of an appeal -
> … (b) a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 80…"

Rule 80 of the Rules of this Court provides:

> "A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal,

as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

The complaint here is that there was no valid Decree extracted and under rules 81 and 85 of the Rules of this Court, the institution of an appeal requires the lodging of a record of appeal which must, inter alia, contain the Decree or Order. It was open to the respondent to apply to this Court to strike out the appeal as incompetent but no such step was taken. No leave was sought or obtained to raise this matter before us. In my view this would be sufficient to dispose of the objection, but the matter raised is of some significance as so many views have been expressed regarding the failure of some advocates to obtain or renew in time their practising certificates.

A somewhat similar situation arose in the case of Alfred Olwora versus Uganda Central Cooperative Union Limited, Civil Appeal 25 of 1992 (unreported) where a preliminary objection was raised at the hearing in the High Court by counsel for the appellant to the effect that the entry of appearance and the written statement of def were signed and filed by an advocate who had no practising certificate. It was submitted that the respondent's pleadings were illegal because it was an offence under section 14(1) of the Advocates' Act, to practice without a practising certificate. It was admitted by counsel for the respondent that the practising certificate had not been renewed at the material time because counsel's accounts had not gone to the Uganda Revenue Authority and secondly, that the Law Council had not inspected counsel's chambers by February 1992 and that accordingly, the High Court could not issue a practising certificate. The learned Judge in the High court held that section 14(1) does not affect the documents filed in court by an advocate on behalf of a client during the period of grace but merely penalises the advocate by denying him costs.

On appeal to the Supreme Court, Odoki JSC dealt with the matter this way:

> "The main issue in this appeal is whether an advocate is entitled to practice without a valid practising certificate during the period of grace as provided for in the proviso to section 14(1) of the Advocates' Act. Secondly, what are the consequences of his so practising? Are the documents which he files valid? Is he entitled to costs in view of section 68 of the Act?"

The learned Justice of the Supreme Court referred to the provisions of section 14(1) of the Advocates' Act and to one or two authorities and continued:

> "In my judgment the decision in Lukera's case correctly sets out the law. Any advocate whose name has been entered on the Roll is required by section 10 of the Advocates' Act to have in force a valid practising certificate before he practices in the courts. Such a certificate is only valid for one year and expires on the 31st December next after the issue, and is subject to renewal. It is an offence under section 14(1) of the Advocates' Act for an advocate to practice without a valid practising certificate. It is clear, however, under the proviso to that subsection that the Advocate cannot be prosecuted before the 1st March.
>
> This means that an advocate enjoys a period of grace for two months during which period; he may practice without a certificate and cannot be prosecuted.
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> I agree with the learned trial judge that the intention of the grace was to enable advocates to renew their certificates by completing all formalities like inspection of chambers which they have to go through before their certificates are renewed. The period was also intended to enable their clients and the general public to benefit from the legal services of advocates without abrupt disruptions. There appears therefore, to be some public interest, which is served by the period of grace. But this does not mean that advocates are relieved from their obligations to renew their practising certificates before the expiration of the

year. It is my view that they do so in order to comply with the law and preserve the honor and dignity of their profession.

What then are the consequences which flow from practising during the period of grace? I am of the opinion and would hold that the documents filed by an advocate during this period are valid.

……..
Section 14 is silent about the status of the document such advocate may sign or files. In my view, as long as the advocate is duly instructed by his client in accordance with 0.3 rule 1 of the Civil Procedure Rules, the documents he signs or files during the period of grace are valid and competent.

However, under section 68 of the Advocates' Act, the advocate is penalized in costs. The section provides,

> 'No *costs* shall be recoverable in any suit, proceedings or matter by any person in respect of which constitutes an offence under the provisions of this Act whether or not any prosecution has been instituted in respect of such offence'.

I agree with the learned trial Judge that an advocate who practices during the period of grace cannot recover his costs through the courts. This penalty is to emphasize the need for an advocate to renew his practising certificate before or soon after its expiration, and not wait until the period of grace has expired, He must carry out his legal practice in strict compliance with the law and professional ethics.

The other members of the Court agreed with the judgment of the learned Justice of the Supreme Court. It is to be noted, however, that the Court did not say anything except perhaps by

implication as to the status of documents signed or filed by an advocate who practices without renewing his practising certificate beyond the 1st of March as in the present case.

I have been at pains to find an authority by this Court on the matter. However in Bakunda Darlington versus Dr. Kinyatta Stanley Civil Appeal No.27 of 1997 (unreported), the High Court decided that an affidavit sworn before a Commissioner for Oaths whose practising certificate as an advocate had expired was invalid. On appeal, the Court of Appeal considered two issues:

1. Whether an advocate who has been appointed a Commissioner for Oaths under the provisions of section 2 of the Commissioners for Oaths (Advocates') Act can continue to serve as Commissioner for Oaths after his practising certificate has expired.

2. What was the effect of an affidavit sworn before a Commissioner for Oaths whose practising certificate as an advocate has expired.

In my view the two issues are the same question put differently.

Be that as it may, the Court of Appeal considered the provisions of section 2 of the Commissioners for Oaths (Advocates) Act and concluded:

> "The Act itself states in clear terms that the commission must be issued to a person who is a practising advocate which means a commission can only be in existence when the particular advocate to whom it was granted is in possession of a valid practising certificate as required by section 10 of the Advocates' Act.

> We accept Mr. Mwesigwa's argument that the commission granted to an advocate under the Act goes with a practising certificate. Once an advocate has ceased to practice, the commission also goes. We are, however, aware of the fact that there are people who under the Act are permitted to serve as commissioners for oaths even though they are not advocates. Under section 4 of the Act, such people are Magistrates, Registrars of the High Court, Deputy Registrars and District Registrars who are ex-officio Commissioners for Oaths. It would be absurd to say that these people would continue to have such powers even if they have ceased holding such offices; the same applies to the advocates.... It was argued on behalf of the respondents that an advocate who does not renew his certificate by the first March, ceases to practice in view of the provisions of sub—section (4) of section 2 of the Act. We are in complete agreement with that line of reasoning. To hold otherwise would defeat the purpose which that sub-section was intended to serve."

The attention of the Court was not drawn to Olwora's case (supra) which although not directly in point but came to the same conclusion at least in respect of what the Supreme Court called "the grace period".

Be that as it may and with respect I think there was some misconstruction of the provisions of section 2 of the Commissioners for Oaths (Advocates') Act. It is quite correct that a commission granted under section 2 lasts until it is revoked or until the grantee ceases to practice as an advocate, "Ceasing to practice" in sub—section (4) does not mean expiry of the advocates practising certificate. It is common knowledge that a practising certificate is issued for a particular year and expires on the 31st December of that year irrespective of the date of issue. If therefore an advocate gave up his legal practice in April to do other business or is suspended from practice, his commission to practice as Commissioner for Oaths would be terminated in April when he gives up the practice or when he is suspended and not on 31st December when his practising certificate expires. This interpretation would tally with the court's own interpretation in relation to registrars and magistrates who are ex—officio Commissioners for Oaths when they leave the office of Registrar or Magistrate, they cease to be Commissioners for Oaths but not when they are on leave or are sick. Otherwise the authority suggests that the work of an advocate who practices without a valid practising certificate after 1st March is invalid and of no legal

effect.

Section 10 of the Advocates Act 1970 provides in sub—sections (1), (2) and (3) thereof as follows:

> "(1) The Registrar shall issue a practicing certificate to every advocate whose name is on the Roll and who applies for such a certificate on such form and on payment of such fee as the Law Council may by regulations, prescribe; …
>
> (2) A practicing certificate shall be valid until the thirty—first day of December next after its issue and it shall be renewable on application being made on such form and on payment of such fee as the Law Council may, by regulations, prescribe; …
>
> (3) Subject to any regulations made under the provisions of sub-section (4) of this section, or under paragraph (f) of sub—section (1) of section 76 of this Act, every advocate who has in force a practicing certificate may practice as such in the High Court or in any court subordinate thereto."

From these provisions, it seems to me clear that an advocate whose name appears on the Roll is not entitled to practice unless he is in possession of a practicing certificate. Such a certificate is issued once and is valid until the 31st day of December next following its issue but is renewable annually. The section is silent on what happens if an advocate whose name appears on the Roll practices without a practicing certificate.
Section 14 (1) of the Advocates Act provides as follows:

> "(1) Any advocate not in possession of a valid practising certificate or whose practising certificate has been suspended or cancelled who practices as an advocate shall be guilty

of an offence:

> Provided that no prosecution shall be commenced under the provisions of this subsection before the first day of March next following the expiry of the validity of an advocate's practising certificate if the reason such advocate is not in possession of a valid certificate is only because he has neglected to renew the certificate which expired on the thirty—first day of December previous to such first day of March."

In the first place, under these provisions to practice without obtaining or renewing a practising certificate is a criminal offence. Secondly, it appears that the proviso is intended to grant a kind of grace period of two months, January and February. No prosecution is to commence for such an offence:

> "if the reason such advocate is not in possession of a valid certificate is only because he has neglected to renew the certificate .. . "

This wording is interesting because it suggests that the commencement of a prosecution depends on the reason for not being in possession of a valid practising certificate. "Neglect to renew" in my view means exactly that, that the advocate has just not bothered to renew. If a general grace period was intended then the Legislature should have simply said "No prosecution shall be commenced under the provisions of this subsection before 1st March", without any qualification.

What if there are genuine reasons for failure to renew as is often the case such as, failure to obtain income tax clearance or inspection of chambers both of which are prerequisites of the issue of a practicing certificate. When should prosecution commence in those circumstances?

The wording is unfortunate but the conclusion inevitable as decided by this Court in the Olwora case that the intention was to give advocates time to organize renewal of their practising

certificates although the learned justice of the Supreme Court remarked that it would be unwise for advocates to wait until their certificates have expired before they take steps to renew them.

On the law and the authorities I have referred to the position appears to be:

(1) that an advocate is not entitled to practice without a valid practicing certificate;

(2) that an advocate whose practicing certificate has expired may practice as an advocate in the months of January and February but that if he does so he will not recover costs through the courts for any work done during that period. The documents signed or filed by such an advocate in such a period are valid;

(3) that an advocate who practices without a valid practising certificate after February in any year commits an offence and is liable to both criminal and disciplinary proceedings (see sections 14 & 18 of the Advocates Act). The documents prepared or filed by such an advocate whose practice is illegal, are invalid and of no legal effect on the principle that courts will not condone or perpetuate illegalities.

I now turn to the main appeal. There were seven grounds of appeal but Mr. Kawanje abandoned grounds 3 & 4.

In my view the most important ground is the second ground of appeal that the learned judge erred in holding that there was no enforceable contract of employment between the parties on the basis of a wrong finding that the respondent's Council had no capacity to contract during the appointment of the s'pn4t as Rector. A decision on this ground would dispose of the appeal because if the contract was unenforceable, consideration of the other grounds of appeal would be academic.

In his judgment the learned trial judge held,

> "If the word 'quorum' means the number of members of the Council whose presence is required for the acts of the body to be valid, and I think that is the correct meaning, then without a quorum, the decisions of the relevant Council were invalid: whether or not the meeting started with a quorum, the quorum must be maintained through out the meeting. This is the responsibility of the Secretary.
>
> It follows then that the Council never validly appointed Prof. Huq as Rector: and since in attempting to do so it would authorise the University to enter into a contract with Prof. Hug, purportedly expressed in the letter of appointment: without that authority, the University had no capacity to contract. There could therefore not be two contracting parties, and therefore no contract.
>
> Any declaration I have to make as prayed would be based upon a valid contract, and therefore I cannot declare that Prof. Hug's purported removal from office was unlawful or that the Prof. Hug is still an employee of the defendant, for that would depend on his valid appointment by the Council, and valid contract with the University. There was none.

Learned Counsel for the appellant submitted on a number of grounds that the learned trial judge came to the wrong conclusion. One such ground I find unassailable was that the parties to the contract believed that there was a contract between them.

In paragraph 4 of the plaint the appellant claimed he was appointed Rector by the respondent on January 1st, 1991 and referred to a copy of the appointment letter.
In paragraph 4 of the written statement of defense, the respondent pleaded,

> "In reply to paragraphs 4 and 5 of the plaint, the defendant avers that it is true that the plaintiff was appointed as Rector as mentioned in paragraph 4 but that due to the plaintiff's mismanagement of the affairs of the defendant, and not through political linkages as alleged, his services were lawfully terminated by the defendant."

After the ruling to the effect that the respondent enjoyed immunity from civil action, the learned trial judge indicated that the only matters the court could enquire into raised by the plaint were:

"Prayer (a) a declaration that the purported removal of the plaintiff from office was unlawful and the plaintiff is still an employee of the defendant…

Prayer (c) a permanent injunction staying and preventing the defendant from removing the plaintiff from office before the expiry of the plaintiff's term of office."

The other prayers in the plaint were dismissed at that stage. The issues were then framed as follows:

> "1. Whether the purported contract of employment between the plaintiff and the defendant was an enforceable contract of employment.
>
> 2. If so what were the terms of that employment and how could it be terminated.
>
> 3. Whether or not the plaintiff was lawfully removed or dismissed."

On the pleadings the contract of employment was not in issue. This was admitted. The respondent clearly pleaded that it employed the appellant as Rector and that his services were lawfully terminated. It appears the appellant worked as Rector for three years. In the

circumstances what was in issue was whether that contract was enforceable especially in view of the diplomatic status of the respondent as found by the learned trial judge. In these circumstances, I do not think that the respondent was at liberty to blow hot and cold by maintaining that there was a contract of service and at the same time say that the appellant was not properly appointed as Rector.

On this submission alone, ground 2 of the appeal would have succeeded and I would find it unnecessary to consider other submissions relating to whether or not the Council had a quorum when it recommended the appointment of the appellant as Rector or whether or not the University had the capacity to contract. But this was not the only ground the Court held the contract unenforceable.

The court also considered the enforceability of any contract between the parties in view of the provisions of the Employment Decree 1975.

The learned trial Judge set out the relevant provisions of the Decree and held,

> "Thus the relevance of s.13 is to make any contract entered into between the Islamic University in Uganda and Professor Hug unenforceable, apparently by either party, if it is a foreign contract; and the question arises, what is a foreign contract?"

The learned trial Judge considered the various arguments put forward and concluded,

> "I take the view that a foreign contract of service exists when there are foreign elements in the contract, that is in all the examples above except possibly 4 and even that would depend on the proper law of the contract. I wish the legislature had defined the term, but looking at Professor Hug's appointment as Professor of Physics, there is no doubt at all

> that any contract of service entered into would be a foreign contract of service, whether one defines the Islamic University in Uganda as a local or foreign employer. And in that case the effect of s.13 would be to render any contract of service which it might be held to have been successfully entered into unenforceable in the courts, in default of compliance with s.13".

For the appellant, it was argued that sections 10 and 13 of the Employment Decree are merely directory and not mandatory. Learned Counsel submitted that by virtue of the provisions of section 5(3) of the Decree, the Decree does not apply to the University which is a Government undertaking.

The section provides as follows in sub section (3) thereof,

> "(3) Sections 3, 8 to 14, 17 to 23 and 61 to 63 of this Decree shall not apply to any government service or undertaking or any public officer or any other person employed by the Government in a civil capacity".

The expression "sections . . . .8 to 14", in the subsection means all the sections from 8 to 14, which includes section 13. Quite clearly, therefore, the provisions of section 13 of the Decree would not apply to any government service or undertaking. The relevant provisions of section 13 of the Employment Decree are as follows,

> "(1) The following contracts shall, subject to section 12 of this Decree, not be enforceable unless they have been approved or attested in accordance with the provisions of this Decree, that is to say,

(a) a foreign contract; …"

It was not disputed that this was a contract required to be in writing by section 10 of the Employment Decree. The learned trial Judge held that this was a foreign contract and there is no appeal against this finding. The only point for our decision, therefore, is whether or not the provisions of section 13 of the Employment Decree apply to the contract.

The expression "employer" is defined in section 66 of the Decree as follows,

> "Employer' means any person, company, firm, or corporation, that has entered into a contract of service to employ any other *person*, and any agent, foreman, manager or factor of such employer, and whether a person has entered into a contract of service with the Government, or with any officer on behalf of the Government, the Government officer under whom such person is working shall be deemed to be his employer".

I think we can safely conclude that the appellant who was employed by the respondent who is a separate person in law could not claim to have been in government service. He was certainly not in the service of the Government. The only issue is whether the respondent is a government undertaking.

The term "government undertaking" is not defined in the Decree. According to the Shorter Oxford English Dictionary, the term "undertaking" means "something undertaken or attempted; an enterprise".

Mr. Kawenja submitted in effect that the respondent was such an undertaking and referred to the Schedule to the Statute.

The agreement which appears in the Statute is headed thus:

“ AGREEMENT
BETWEEN THE GOVERNMENT OF THE REPUBLIC OF UGANDA AND THE ORGANISATION OF THE ISLAMIC CONFERENCE ON THE ESTABLISHMENT, STATUS AND IMMUNITY OF THE ISLAMIC UNIVERSITY IN UGANDA

The two parties signatory to this Agreement have agreed that the Islamic University in Uganda and the staff thereof shall be subject to the provisions of this Agreement so that the aforesaid University can fulfill its objectives and perform the tasks stated in the statutes of the Islamic University in Uganda”.

I am not persuaded that merely because the Government has entered into an agreement with the Organization of the Islamic Conference on the establishment, status and immunity of the Islamic University in Uganda, the University which was set up pursuant to the agreement was a government undertaking. First, the University is set up as a Corporation under section 2 of the Statute. Section 9 of the Statute sets out the authorities of the respondent which comprise the University Council, the Executive Board and Rectorship of the University. The University Council consists of 16 members, only 5 of whom are appointed by the Government. The University Council is the supreme organ cf the University responsible for the administration of the University. There is no government appointee on the Executive Board which conducts the day to day business of the University. The Rector who is the Chief Executive Officer of the University is not appointed by the Government.

I find nothing in the Statute to suggest that the respondent is a government undertaking, I must therefore hold, in agreement with the learned trial Judge, that section 13 of the Employment Decree applies to the respondent and that accordingly the contract between the appellant and respondent which is not in compliance with the Employment Decree is not enforceable. I think

this would dispose of the appeal.

As I said earlier in my judgment the remaining grounds of appeal would not affect the result of the appeal whichever way they are decided and I find no purpose in dealing with them.

I would dismiss this appeal with costs and as both Tsekooko and Karokora JJSC agree, it is so ordered.

Dated at Mengo this 7th day of November 1997.

S.W.W.WAMBUZI
CHIEF JUSTICE

JUDGMENT OF TSEKOOKO, J.S.C.

I have had the advantage of reading in draft the judgment prepared by my Lord the Chief Justice and I agree that the appeal should be dismissed with costs to the respondent.

There is an aspect of this appeal which is of great importance both within the legal fraternity and the litigating public. This is the consequence of practicing or signing of documents by advocates who have no valid practicing certificate. It appears from petitions or cases decided by the High Court and the Court of Appeal and from newspaper articles that cases have been decided on the technical point whereby a case is lost because an advocate signed pleadings when he was not in possession of a valid practicing certificate. Unfortunately I have not been able to find a provision in the Advocates' Act, 1970 which states that pleadings become invalid or illegal if they are signed by an advocate who does not possess a valid practicing certificate. I think that if parliament intended to declare illegal or invalid, pleadings signed by advocates without valid

practicing certificates the legislature would have said so.

Thus Sections 10 and l4 of the Act read as follows:

> ”10. *(i)* The Registrar shall issue a practicing certificate to every advocate whose name is on the Roll and who applies for such a certificate on the prescribed form.

(2) A practising until the thirty first its issue and it shall application being made

Certificate shall be valid day of December next after be renewable annually on the prescribed form.

*(3)* Subject to any regulations made under the provisions of subsection *(4)* of this section, every advocate who has in force a practicing certificate may practice as such in the High Court or in any court subordinate thereto and may perform any of the functions which in England may be performed by member of the Bar as such or by a solicitor of the Supreme Court of Judicature as such.
*(4)* The Law Council may by regulations prescribe that for a specified period of time after enrolment, an advocate shall have a right of audience only before such courts as may be designated.
*(5)* Any advocate who contravenes or fails to comply with any of the provisions of regulations made under subsection (4) of this section shall be
guilty of an offence.”
By 14. (1) “Any advocate not in possession of a valid practising certificate whose practising certificate has been suspended or cancelled who practices as an advocate shall be guilty of an offence:

Provided that no prosecution shall be commenced under the provisions of this subsection before the first day of March next following the expiry of the validity of an advocate’s practising certificate if the reason such advocate is not in possession of a valid certificate

is only because he has neglected to renew the certificate which expired on the thirty-first day of December previous to such first day of March".

The above provisions do not declare invalid pleadings signed by an advocate who has no practising certificate. And by Section 63(1) "Any person other than n
advocate who shall either directly or indirectly act as an advocate or agent for suitors, or as such sue out any summons or other process, or commence, carry on or defend any suit or other proceedings, in any court, unless authorized so
to do by any law, shall be guilty of an offence.

Section 63(1) does not declare illegal any summons or other process issued in contravention of the Section.

By Section 68 "No costs shall be recoverable in any suit, proceeding Or matter by any person in respect of anything done, the doing of which constitutes an offence under the provisions of this Act, whether or not any prosecution has been instituted in respect of such offence".

Here an advocate who contravenes the provisions of the Advocates' Act is prevented from recovering his costs.

It appears to me that the provisions of the Advocates' Act do not render in valid pleadings drawn or prepared by an advocate who has no valid practising certificate by the fact that he had no practising certificate.

The intention of the legislature appears to be aimed at punishing the errant advocate by denying him remuneration or having him prosecuted. I find nothing in the Provisions I have referred to

which penalize an innocent litigant. That is why the Court would deny audience to an advocate without a practising certificate but should allow a litigant the opportunity to conduct hi case Or engage another advocate.

I am buttressed in this conclusion by the English decision of Sparling vs. Brereton (1866) L.R. 2 Eq 64. In that case a plaintiff instituted a case. A.B. a Solicitor for the defendant entered appearance and filed other subsequent pleadings. Thereafter there was a Chamber "application on the part of the plaintiff that appearance entered in this cause, and all subsequent proceedings by A.B., might be set aside, on the ground that at the time when the appearance was entered the said A.B. had not taken out an annual certificate entitling him to practise as Solicitor of (the Court)". Because I find this decision of considerable persuasive value, I shall set out its facts in some detail.

The name of A.B. appeared in the 'Law list" for *1865,* and between the 15th of November and the 16th of December 1865, he bespoke his annual certificate at the Law Institute for practising as an Attorney and. Solicitor.

By (English Statutes) 23 & 24 Vict 127, S. 22, every certificate issued between the 15th of November and 16th of December in any year shall bear date and take effect for a11 purposes from the 16th of November provided it be stamped before the 16th of December. If not stamped before the 16th December, it shall take effect, as regards the qualification to practise on the day on which it is stamped. All certificates continue in force until 13th November next following and the "Law List" shall, until the contrary be made to appear, be evidence in all the Courts that the persons named therein as Attorneys & C., holding such certificates. A.B. did not get his certificate stamped until the 30th of December 1865. The appearance which was now sought to be set aside was entered by him on the 7th of December 1865. The application to set the appearance aside was taken out on the 22nd of January 1866.

Sir W. Page Wood, V.C., made his ruling in the following words **(**at page 67) —

> "The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a Solicitor who acts for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous, indeed, if persons, without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their Solicitor. As against third parties the acts of such a person acting as a Solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his Solicitor was on the roll, would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering, because, at the time when the appearance which it is sought to vacate was entered, the Solicitor had no certificate. The result of the authorities is thus stated by Erle, J., in Holgate vs**.** Slight 21 L.J. (Q.B.) 74 :— "It seems to me, therefore, that an attorney, though uncertificated, may do acts in his capacity of attorney, but that the result will be that be will, in such case, lose his fees."

The learned Vice—Chancellor concluded —

> "I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate bad the effect of invalidating all proceedings taken in the suit".

The above statement appears still 5 be the law in England. See paragraphs 57 and 353 of Halsbury's Laws of England, 4th edition at pages 38 and 266 respectively. See Richards vs. Boatock (1914) 31 T.L.R. 70. In Richards vs. Botock (1914) 31 L.T.R. reported at page 43, Vol. 43, English And Empire Digest during the trial it appeared that the plaintiff's Solicitor held a

Country certificate Only, although his address on the writ was given as “Lombard Stree, E.C., “the judge though, holding that the Solicitor, was committing an offence, declined to dismiss the action, but ordered the case to stand over so that the plaintiff, might be able to consult another Solicitor”.

Mr. Justice Tinyinondi followed the reasoning of Page Wood, V.C., at page 8 of his ruling in High Court Election Petition No. 19 of 1996 (Jesse Gulyetonda vs. Henry Muganwa Kajura and two others. (Unreported) although he struck out the petition on other grounds.

Solicitors in England draft and sign pleadings in much the same way advocates do so in this Country. The authorities I have just referred to are not binding on me, but I find the reasons therein sound and I would adopt the same reasoning.
I think that deeming as illegal documents prepared by an advocate without practising certificate amounts to a denial of justice to an innocent litigant who innocently engages the services of such an advocate. A litigant would hardly inquire from an advocate if the particular advocate has a valid certificate. This is the business of the Courts and the Law Council. To say that litigants who engage advocates without practising certificate do so at their peril is harsh because the majority of our people would not know which advocate i.e. not entitled to practice.

We have not in this appeal benefitted from arguments of advocates as regards the Court of Appeal decision in Bakunda Darlington vs. Dr. Kinyatta Stanley & F. Ntaho (C.A. Civil Appeal No. 27 of 1996 (unreported). In that case the trial judge struck out an election petition on the technical ground that the petition was supported by an incompetent affidavit since the affidavit had been sworn before a Commissioner for Oaths who did not have a valid practicing certificate as an advocate. The Court of Appeal relied on cases decided by this Court for the view that any pleadings signed by an advocate without a valid Practicing certificate are invalid: These cases are Olwora vs. Uganda Central Co—operative Union Ltd. — Civil Appeal No. 25 of 1992 (unreported) and Kabogere Coffee Factory Vs. Hajji Twahibu Kegongo — Supreme Court Civil Application No. 10 of *1993* (unreported). I think that these two cases are distinguishable. The

Court of Appeal further relied on the Makula International vs. Cardinal Nsubuga (1982) H.C.B. 11 for the view that a Court cannot condone illegality. The Olwara case and Kabogere case did not in fact specifically determine the issue I am discussing now. was concerned with validity of pleadings during the grace period, hinted on possibility of invalidity of pleadings after grace period.

I think that the Court would be guilty of condonation of illegality if it allowed an advocate who does not possess £valid practicing certificate to recover his costs through Court.

I think, therefore, that documents drawn by an advocate without a practicing certificate should not be regarded as illegal and invalid simply because the advocate had no valid practicing certificate when he drew or signed such documents.

In my opinion Article 126(2) (e) of the Constitution would be infringed if a Pleading is declared invalid because it was signed by an advocate who does not possess a valid practicing certificate.

Delivered at Mengo this 7th day of November 1997.

J.W.N. Tsekooko,
Justice of t e Supreme Court.

**JUDGEMENT OF KAROKORA, J.S.C.**

I have had the benefit of reading in draft the judgment of Wambuzi, *C.J.*, and do agree with him that the appeal must be dismissed with costs and for that matter. I have got nothing useful to add**,** except on one aspect concerning some advocates who keep on practising when they have not

renewed their practising Certificate.

It is very well known by every advocate in Uganda that is an offence for any of them to practice as advocates when he has not renewed his practising certificate. Section 14(1) of the Advocates Act 22/1970 provides as follows:—

> "Any advocate not in possession of a valid practicing Certificate or whose practicing Certificate has been suspended or cancelled who practices as an advocate shall be guilty of an offence provided that no prosecution shall be commenced under the provisions of this sub—section before the first day of
> March next following the expiry of the validity of an advocates practising Certificate, if the reason such advocate is not in possession of a valid Certificate is only because he has neglected to renew the Certificate which expired on the 31st day of December previous to such first day of March."

In this case the complaint was that none of the advocates in the firm of M/S Kayondo & Co Advocates had a valid practicing Certificate when the decree complained or was extracted on 2nd August 1983. The complaint was that in view of the above no valid decree had been extracted under rules 81 and 85 of the rules of this court and therefore it was open to the respondent to apply to strike out the appeal as incompetent, since no leave had been sought and obtained. Mr.Kawenja appearing for appellant never denied the allegation raised, but contended, and rightly so, that the objection could not lie at this stage as there was no leave of the Court sought and granted under rule 101(b) of this Court.

> ''The Rule provides as follows: —
> 101 "At the hearing of an appeal,
>
> > (b) a respondent shall not without the leave or toe Court, raise any objection to roe competence of toe appeal which might nave been raised by application under Rule

80.”

Clearly, from the above provisions, as no leave had been sought and obtained, this matter could not be raised informally at this stage, Therefore the objection was put to rest at that stage, but I think it would not he enough o stop at the stage without discussing the consequences of an advocate who practices in Court without practicing Certificate and the effect of the documents the files on behalf of his client when he has no practicing certificate.

The High Court of Uganda has handed many cases where Advocates practising without valid practicing Certificates were involved. In **RE M/S Lukeera and co. Advocates Misc cause NO. 76 of 1973 reported in (1978) HCB 198,** Mr. Lukeera had not yet renewed his practising Certificate in February when he filed a suit on behalf of his client. His client was successful. When he filed the application for Taxation a pre1iminary objection was raised at the hearing of the application on the ground that he no had no right of audience as he did not have practising Certificate.

It was contended that he could not recover costs because when he accepted clients’ brief, he was not entitled to practice Section 68 of the Advocates Act was relied upon in support of the objection. For Mr. Lukeera it was contended that the proviso to subsection 1 of Section 14 of the Advocates Act protected him.

Odoki, J as be then was, held that it was an offence under Section 14 of the Advocates Act, for an advocate to practise without a valid practising Certificate. The Section was intended to penalise all Advocates who practise without a practising Certificate. It was held that once a practising Certificate expires, an advocate must renew it and if he does not do an, he commits an offence. Although he may not be prosecuted until the time of grace expires, if he practices, he cannot recover costs through the Court in respect of anything done when the Certificate had not been

renewed.

In **Evaristo Mugabi v. The Attorney General HCCS No 109 of 1971**, Mr. Mugabi who was the plaintiff had flied a plaint which he had signed as an advocate for plaintiff, although he was the plaintiff.

At the hearing, a preliminary objection was raised against the whole plaint as being incompetent, alleging that at the tine Mr. Mugabi prepared, signed and filed the plaint, he had no valid practicing Certificate as an Advocate. The objection was upheld by the trial Judge who struck out the plaint, although the plaintiff could not prepare and sign the plaint as an advocate representing himself.

In **Jesse Gulvetonda V. Henry Muganwa Kajura and Others Election Petition No. 19/1996** the learned trial Judge castigated the advocate whom he discovered had been practising as advocate for 3 years without a valid practising Certificate. He described him as no better than a common thief. He Implored the Chief Registrar to bring the matter to the attention of the Law Council and the Law Society for possible prosecution. In **G. T. Kiyamba kaggwa V Rasool. Khan HCCS Misc Civil Application No. 223 of 1996, t**he same Judge held that the documents which were filed after the grace period were incompetent.

In **Alfred Olwora v.Uganda Central Co-operative Union Ltd Civil Appeal No 25/1992 (SC)** (unreported) the supreme court while dealing with an appeal where a preliminary objection had been raised before the trial court that the entry or appearance and the written statement of defence which were signed and filed by an uncertificated advocate were incompetent. The learned trial Judge had overruled the objection**,** holding that Section 14 (1) of the Advocates Act did not affect the documents filed in Court by an advocate who is not having a valid practicing Certificate on behalf of his client during the period or grace but merely penalizes the advocate by denying him costs.

On appeal, Odoki, J.s.c., who wrote the leading judgment, had this to say on page 6 last paragraph:-

> "Any advocate whose name has been entered on the Roll is required by Section 10 of the Advocates Act to have in force a valid practicing Certificate before he practices in the Courts. Such a Certificate is only valid for one year and expires on the 31st of December next after the issue and is**,** subject to renewal. It is an offence under Section 14(1) of the Advocates Act for an Advocate to practise without a valid practicing Certificate. It is clear; however, under the proviso to that subsection that the advocate cannot be prosecuted before the 1st March. This means that an advocate enjoys a period of grace for two months during which period; he may practise without a Certificate and cannot be prosecuted**.**
>
> I agree with the learned trial Judge that the intention of the period of grace was to enable advocates to renew their Certificates by completing all formalities like inspection of Chambers which they have to go through before their Certificates are renewed. The period was also intended to enable their clients and the general public to benefit from the legal services of advocates without abrupt disruption
> What then are the consequences which flow front practicing during the period of grace? I am of the opinion and would hold that the documents filed by an Advocate during this period are valid. It seems to me that both Sections 14 and 68 of the Advocates Act envisaged an Advocate practicing without a Certificate. Section 14 is silent about the Status of the document such advocates may sign and files. In my view as long as the advocate is duly instructed by his client in accordance with Order 3 r1 of the Civil Procedure Rules, the documents he signs or files during the period of grace are valid and competent."

After quoting Section 68 of the Advocates Act, Odoki, J.S.C., concluded:—

> "I agree with the learned trial Judge that an advocate who practices during the period of grace cannot recover his costs through the Courts."

I do agree with the above position regarding uncertificated advocate who practices during the period of grace.

The question that remains is what are consequences that flow from an uncertificated advocate who practises after the period of grace?

The Supreme Court of Uganda in **kabogere Coffee Factory Ltd** & Anor V. **Haji Twaibu Kigongo SC Civil Application No. 10/ 1993** (unreported) referred to **Alfred olwara V. UCCU Ltd** (supra) stated:-

> "This Court held that it was an offence under Section 14(1) of the Advocates Act, 1970, for an Advocate to practice without a valid practising Certificate, and that under the proviso to the sub—Section, an advocate could not be prosecuted before the 1st of March. This means that an advocate enjoys a period of grace of two months during which period he may practice without a Certificate and cannot be prosecuted. Consequently, documents filed by such an advocate during the period of grace are valid.
> In the instant case since the affidavits stated that the advocate concerned did not have a valid practicing Certificate it must be taken that the documents were filed after the grace period had expired."

It must be noted that the Uganda Court of appeal in **Bukunda Darlington** v. **Kinyatta Stanley Civil Appeal No. 27 of 1997.** (Unreported) noted and rightly so, in my view that the **Olwora's** case never specifically say what would happen to acts of an advocate done beyond the period of grace. There still remained a lacuna. The court or appeal thought that the lacuna had been filled by the Latest Case of **Kabogere Coffee Factory V. Haji Twalibu Kigongo** (supra) and Concluded that **Kabogere case** had settled the position that documents filed after the expiration

of the days of grace were invalid.

With respect, the Supreme Court in the case of **Kabogere coffee Factory (supra)** stated:- Consequently, documents filed by such an advocate during r the period of grace are valid.

In the instant case; since the affidavits stated that the advocate concerned did not have a valid practicing certificate, it must be taken that the documents were filed after the grace period had expired."

The court never went further to specifically state that documents filed after the expiration of the period of grace were invalid. However, in their conclusion, the Justice of the court of appeal in **D. BakundaV. Dr. Kinyatta's** (supra) held that all the acts which uncertificated advocate performs in his capacity as an advocate or commissioner for Oaths after the period of grace has expired are invalid.

There is no doubt that the law gives uncertificated advocate, the period of grace from 31st December to the end of February within which he can practice without being prosecuted; but the law makes it clear that if he does so, he cannot claim costs in the court for the work he does during the period of grace.

The Alfred Olwora case and Kabogere Coffee Factory case have clearly stated that documents signed and filed by the uncertificated advocate during the period of grace are valid.
However, It must be observed from the provisions of section 14(1) of the Advocates Act, 1970, any advocate who practises as such without a valid practicing Certificate commits an offence and liable to be prosecuted. Now question is whether or not the document he signs and files on behalf of his client after the period of grace when he has no valid practicing certificate are valid.

It must be noted that when he proceeds to practice in contravention of Section 14(1) of the Advocates Act he commits an offence under the Act. In my view what he does in perpetration of the offence cannot be lawful, because these are the acts he uses in furtherance of the commission of the offence under the Act. Therefore the documents prepared, signed and filed by such an

advocate whose practice is illegal, are invalid and of no legal effect, because Courts would not condone illegality. In fact, Makula International V. Cardinal Emmanuel Nsubuga(1982) HCB 11 where it was held that no Court can sanction or condone an illegality which has been pointed out to it would render both the work and documents prepared, signed and filed by him Invalid.

I do share the strong sentiments of Sir Wood vice-chancellor in Sparling V.Breireton (1866) 11 LR (equity cases) where he held that proceedings taken on behalf of a defendant by a solicitor who had not at the time renewed his annual Certificate will not be set aside as irregular. Sir Wood vice chancellor went on and stated that it would be most mischievous, Indeed if persons, without any powers of informing themselves on the subject, should be liable for the consequences of any irregularity in the qualification of their solicitor.

Sir Wood cited with approval the dictum of Erle S in Holdgate V. Slight 21 QB 74 where it had been held as follows:

"It seems to me**,** therefore, that an attorney, though uncertified may do acts in his capacity of attorney, but that the result will be that he will in such case, lose his fees……
an attorney neglecting to procure certificate does not require re-admission. His name remains on the roll, but he is incapable or recovering any fees for business done by him whilst he should have been acting without a certificate. I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit."

While I sympathise with clients of such Lawyers the law Uganda does not only prohibit lawyers from practicing without practicing Certificate, but it also makes it an offence for such a lawyer to practice without a valid practicing certificate, The advocate in uganda is an officer of the court. See section 15 of the Advocates Act, 197O. He knows very well that under Section 14(1) of the Advocates Act, it is an offence him to practice without a valid practicing Certificate. He therefore commits this offence fully knowing the consequences.

The client of his may not be aware or these facts, but when he instructs and briefs him to handle his case, the instruction and brief are done under Order 3rl of the civil procedure rules. So the advocate takes on the case as an agent of his client .If in the process of carrying out the agency,

ho commits an offence for which he is liable to punishment, the client or principal cannot successfully wriggle our of the consequences of the offence committed by his agent.

In my view, the remedy for the innocent parry would lie in either starting the suit afresh, or seeking leave to file defence out or time or seeking exemption from limitation or suing for damages for professional negligence or for any other remedies.

Therefore all in all considering all the authorities discussed above, I think the position of the law seems to be;

1. An Advocate is not entitled to practice law
without a valid practicing certificate.

2. An Advocate whose practicing certificate has expired may practise as an advocate during the period of grace, i.e. during the month or January and February, out if he does so, he will not recover his costs through court process for any work done during that
period; but the documents he prepares, signs and files during the period or grace are valid.
3. An Advocate who practices after the period of grace without a valid practicing certificate commits an offence and is liable to prosecution under section 14(1) of the
Advocates Act.

Therefore the documents he prepares, signs and files are illegal as he does so in perpetration of the offence under Section 14(1 *)* of the Advocates Act. Accordingly such documents are invalid and of no legal effect as no Court can sanction or condone an illegality which is brought to its notice.

On the rest of the appeal I have got nothing useful to add.

Dated at Mengo this 7th day of November 1997

A.N.KAROKORA

JUSTICE OF THE SUPREME COURT